

**PUBLIC
VERSION**

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TEST SOLUTIONS LLC and SILICON TEST
SYSTEMS INC

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

VERIGY US, INC., a Delaware Corporation,

Plaintiff,

v.

ROMI MAYDER, an individual; WESLEY
MAYDER, an individual; SILICON TEST
SYSTEMS, INC., a California Corporation;
and SILICON TEST SOLUTIONS, LLC, a
California Limited Liability Corporation,
inclusive,

Defendants.

AND RELATED COUNTERCLAIMS.

Case No. 5:07-cv-04330-RMW (HRL)

**DEFENDANTS' REPLY MEMORANDUM
IN SUPPORT OF MOTION TO COMPEL
DOCUMENTS RE POCHOWSKI IN
RESPONSE TO FIRST DOCUMENT
REQUEST**

Date: September 30, 2008

Time: 10:00 a.m.

Courtroom 2

Before the Hon. Howard R. Lloyd

Complaint Filed: August 22, 2007

Trial Date: December 8, 2008 (jury trial)

(Defendants have elected to reserve their jury
trial rights under F.R.C.P., Rule 38)

HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY

DOCUMENT SUBMITTED UNDER SEAL

INTRODUCTION

Plaintiff Verigy, Inc.'s ("Verigy") opposition to the motion to compel further production of documents that have been withheld by Verigy under a so-called common interest between Verigy and third party witness Robert Pochowski is premised upon the notion that a pig's ear can be a silk purse. Put another way, Verigy would like the Court to believe that the Emperor is wearing clothes, when in fact he is stark naked. There is no viable common interest between Verigy and Mr. Pochowski, and Verigy's calling an interest "common" does not make it so. Indeed, when the alleged common interests between Verigy and Mr. Pochowski are scrutinized, it is clear that they are (a) legally not viable, (b) conclusory and contrary to common sense and (c) contrary to Mr. Pochowski's own deposition testimony. Further, nowhere does Verigy's opposition even address Mr. Pochowski's testimony, in which he confirmed that no common interest with Verigy existed, and instead tries to create a common interest after the fact.

Verigy concedes that an *in camera* inspection is appropriate; Defendants believe that Verigy has not met its burden of showing a common interest, and that the withheld documents should be produced; if there is any question in the Court's mind as to whether such documents should be produced, however, Defendants request that the Court conduct such inspection.

ARGUMENT

I. VERIGY HAS MISCITED THE LAW IN ORDER TO CLAIM A COMMON INTEREST BASED UPON UNVIALE COMMERCIAL BASE

Verigy's brief in opposition ("Opp.") to Defendants' motion to compel the production of documents relating to communications with Robert Pochowski and his attorneys, contained on privilege logs produced by Verigy in this action, purports to set forth the law in this District and Circuit regarding when the common interest doctrine applies. Indeed, Verigy chastises Defendants by claiming that they have relied upon bad law in referring to the decision in *Nidec Corp. v. Victor Co. of Japan*, 2007 U.S. Dist. LEXIS 48841, at *14 (N.D. Cal. July 3, 2007). It is Verigy, however, that has gotten the law dead wrong and that is relying upon unviable "common interests."

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1 First, the decision by this Court amending its earlier decision in *Nidec*, at 249 F.R.D. 575
 2 (N.D. Cal. July 5, 2007) did *not* “supersede” the earlier decision, as Verigy claims. The earlier
 3 decision remains in good standing (as a simple Shepardizing exercise by Verigy would have
 4 confirmed), and has in fact been recently relied upon in at least one other district court. *See*
 5 *Net2Phone, Inc. v. eBay, Inc.* 2008 U.S. Dist. LEXIS50451, at *24 (D.N.J. June 26, 2008). More
 6 importantly, the subsequent *Nidec* decision cited by Verigy contains the very same statement of
 7 law that was relied upon by Defendants in the earlier decision, namely “the basic requirement of
 8 the common interest exception that the parties must have ‘a common legal, *as opposed to*
 9 *commercial, interest.*’” *Nidec*, 249 F.R.D. at 579 (emphasis added), *quoting Bank Brussels*
 10 *Lambert v. Credit Lyonnais*, 160 F.R.D. 437, 447 (S.D.N.Y. 1995)(the common interest doctrine
 11 does not encompass a business relationship which simply happens to have as one of its elements a
 12 fear of litigation). Thus, it is Verigy that is attempting misread the law in this District and Circuit,
 13 law that rejects a commercial interest as the kind that will support a common interest claim.
 14 Verigy’s reliance upon a reference book to the attorney-client privilege is hardly persuasive
 15 authority in the face of the clear law.

16 A number of the bases of common interests asserted by Verigy, even if not viewed as
 17 completely conclusory, are based upon so-called commercial interests that Verigy and Pochowski
 18 allegedly share. Those bases are not proper bases for asserting the common interest, and should be
 19 discarded in the Court’s analysis. Among those bases are:

20 1. **Verigy’s alleged basis that there is a common interest in establishing that Romi**
 21 **Mayder misappropriated Verigy trade secrets.** Opp. at 4, section a. The reasoning advanced
 22 by Verigy in this section is curious; it first claims that Pochowski’s interest is because he “has an
 23 ongoing business...” Such an interest is another way of saying that Pochowski would want to
 24 assert ownership of trade secrets belonging to STS, *or Verigy*. His interest is adverse to Verigy’s,
 25 not common. Second, Verigy then states that Pochowski might have a legal interest in establishing
 26 that Mr. Mayder made certain misrepresentations to him about Verigy not owning trade secrets.
 27 This reasoning is absurd; Mr. Pochowski has no interest, legal or commercial, in establishing that
 28 Verigy owns something that Mr. Pochowski himself wants to claim ownership of. Further, there is

1 no showing that there is any claim of fraud or misrepresentation that has ever been asserted by Mr.
 2 Mayder against Mr. Pochowski, only a claim of ownership of rights, as Mr. Pochowski's own
 3 declaration confirms.

4 **2. Pochowski's and Verigy's supposed interest in showing that each of them owns**
 5 **the intellectual property that STS claims it owns.** Opp. at 4, section b. In not only constituting
 6 a mere commercial basis, this basis in fact reflects an *adverse* relationship between Pochowski and
 7 Verigy, not a common one. Verigy has steadfastly claimed in this litigation that it owns *all*
 8 *intellectual property* developed by STS LLC and Inc. Any assertion of ownership of intellectual
 9 property developed by STS by Pochowski would stand in express contradiction to Verigy's claim
 10 of ownership.¹ This basis evidences a lack of common interest.

11 **3. Pochowski's supposed interest in preserving Verigy's trade secrets.** Opp. at 4,
 12 section c. This basis for an alleged common interest is transparently improper, and like the bases
 13 in section b, above, in fact supports the view that there is an adverse, not common, interest
 14 between Verigy and Pochowski. The supposed basis for Pochowski to maintain the trade secrecy
 15 of Verigy's trade secrets is his desire to "enjoy[] a long term, cordial, business relationship with
 16 Verigy...." Opp. at 4. Again, this basis is purely commercial, and therefore under this District's
 17 and Circuit's law does not provide a viable legal common interest. Additionally, however, the
 18 reference to Mr. Pochowski's desire to maintain a cordial relationship with Verigy is another way
 19 of saying that he wants to avoid being sued by Verigy. This issue is at the crux of this Motion—
 20 Defendants are informed and believe that Pochowski has entered into this so-called common
 21 interest with Verigy to avoid being sued, and Defendants are entitled to discover documents that
 22 show that threat of suit, in order to establish Mr. Pochowski's bias.

23 **4. Verigy's attempted reliance upon a common interest with Pochowski in**
 24 **protecting against claims that STS's trade secrets were misappropriated.** Opp. at 5, section
 25 (e). This alleged basis is just a rehash of section (c), dealing with "who owns the intellectual
 26

27 ¹ Mr. Pochowski's supposed interest in intellectual property was in connection with a utility
 28 patent application filed by STS. *See*, Pochowski Declaration submitted with Verigy's
 opposition papers, at para. 6. Verigy has claimed ownership in that very application.

1 property.” As addressed in detail above, there is no common interest between Verigy and
 2 Pochowski in this regard, only an adverse one.

3 In addition to these bases not being legally sufficient to establish a common interest, they
 4 are contrary to Mr. Pochowski’s sworn deposition testimony, testimony contained in Defendants’
 5 moving papers, but completely unaddressed by Verigy in its opposition papers. In deposition, Mr.
 6 Pochowski testified to the following (submitted with the Hale Decl. with the moving papers):

7 Q: [REDACTED]

8
 9 A: [REDACTED]

10 Pochowski Oct. 2 Depo. at p. 72.

11 O: [REDACTED]

12 A: [REDACTED]

13 Q: [REDACTED]

14 A: [REDACTED]

15 Pochowski Oct. 2 Depo. at p. 80.

16 Q: [REDACTED]

17 A: [REDACTED]

18 Pochowski Oct. 2 Depo. at pp. 81-82.

19 Q: [REDACTED]

20 A: [REDACTED]

21 Pochowski Oct. 2 Depo. at p. 82.

22 Q: [REDACTED]

23 A: [REDACTED]

24 Q: [REDACTED]

1 [REDACTED]

2 A: [REDACTED]

3 ***

4 MR. ERLICH: [REDACTED]

5 A: [REDACTED]

6 Q: [REDACTED]

7 A: [REDACTED]

8 Pochowski Oct. 2 Depo. at pp. 82-83. Thus, when questioned on cross-examination, Mr.

9 Pochowski admitted he has no real alignment with Verigy, either commercial or legal. Verigy

10 pretended this testimony did not exist in its opposition papers, and it bears the repetition above.

11 All of the above bases offered by Verigy must be rejected, as a matter of law.

12 **II. THE OTHER BASES FOR A COMMON INTEREST ARE CONCLUSORY.**

13 Verigy offers two other bases for the alleged common interest, and they are completely

14 conclusory. First, [REDACTED]

15 [REDACTED] Opp. at 5, section (d). [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED] While not beginning to describe how Verigy intends to protect Mr. Pochowski in

20 this regard, this basis also rests on the foundational premise that Mr. Pochowski would not give

21 truthful testimony unless Verigy were somehow aligned with him, and there is absolutely no

22 showing by Verigy as to this manufactured position.

23 As with most all of the other bases, Verigy [REDACTED]

24 [REDACTED]

25 Opp. at 5. This is, again, Verigy's improper, commercial interest speaking, and as noted

26 repeatedly above, its and Pochowski's interests in connection with such ownership are adverse to

27 Verigy's, not common or aligned with it.

28 //

1 The last basis for common interest advanced by Verigy is that there is a common interest in
2 [REDACTED]. Verigy notes that Mr. Pochowski, as a key witness, has had to
3 incur legal expenses. Verigy makes no demonstration whatsoever, however, of how Mr.
4 Pochowski is somehow saving money in this action. Perhaps the truth is that Verigy is paying for
5 Mr. Pochowski's legal expenses, but that, too, should be able to be discovered. Rather, Verigy's
6 asserted basis is nothing more than a conclusory one that it can use to hide its communications
7 with someone it undoubtedly threatened to sue in exchange for cooperation.

8 Verigy has no viable basis for claiming a common interest with Mr. Pochowski; that
9 interest is adverse, not aligned. While having now produced their common interest and joint
10 defense agreement, Verigy has conveniently failed to produce another agreement referenced
11 therein, [REDACTED]
12 [REDACTED] See, Declaration of Michael Stebbins, submitted by Verigy with its opposition papers, at
13 Exhibit A, para. 1.6 therein. The privilege log from Verigy shows numerous email
14 communications prior to that earlier agreement as well, communications wherein Verigy likely
15 threatened legal action against Mr. Pochowski. Defendants should be entitled to show that the real
16 basis for his testimony is avoiding legal action by Verigy, not some alleged common interest.

17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED] This recent
23 action by Verigy affirms its adverse, not common, interest with Mr. Pochowski, and increases the
24 likelihood that Verigy has in fact threatened Mr. Pochowski as well with legal action, but is
25 attempting to hide that biasing fact.

26 CONCLUSION

27 For the reasons highly stated above, the Court should grant the motion seeking to compel
28 the withheld Pochowski documents. If the Court is not initially inclined to grant it on the bases set

1 forth above, Defendants respectfully request that the Court conduct the *in camera* review conceded
2 by Verigy.

3
4 Dated: September 16, 2008

Respectfully submitted,

RUSSO & HALE LLP

5 By: /s/ Tim C. Hale
6 Tim C. Hale

7
8 Attorneys for Defendants SILICON TEST
9 SYSTEMS, INC., ROMI MAYDER,
10 SILICON TEST SOLUTIONS, LLC and
11 WESLEY MAYDER
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